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978-0-521-11365-6 - An Introduction to Property Theory
Gregory S. Alexander and Eduardo M. Peñalver
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AN INTRODUCTION TO PROPERTY THEORY

This book surveys the leading modern theories of property – Lockean, libertarian, utilitarian/law-and-economics, personhood, Kantian, and human flourishing – and then applies those theories to concrete contexts in which property issues have been especially controversial. These include redistribution, the right to exclude, regulatory takings, eminent domain, and intellectual property. The book highlights the Aristotelian human flourishing theory of property, providing the most comprehensive and accessible introduction to that theory to date. The book's goal is neither to cover every conceivable theory nor to discuss every possible facet of the theories covered. Instead, it aims to make the major property theories comprehensible to beginners, without sacrificing accuracy or sophistication. The book will be of particular interest to students seeking an accessible introduction to contemporary theories of property, but even specialists will benefit from the book's lucid descriptions of contemporary debates.

Gregory S. Alexander is a nationally renowned expert in property and trusts and estates and the A. Robert Noll Professor of Law at Cornell University. Following his graduation from Northwestern University School of Law, he clerked for the Honorable George Edwards of the U.S. Court of Appeals for the Sixth Circuit. Alexander is the winner of the American Publishers Association's 1997 Best Book of the Year in Law award for his work *Commodity and Propriety*. More recent books include *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* and *Property and Community* (with Eduardo M. Peñalver). He is co-author of the most widely used property casebook in the United States (with James Krier and Michael Schill). His articles have appeared in such journals as the *Columbia Law Review*, the *Stanford Law Review*, the *Michigan Law Review*, and the *Cornell Law Review*.

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CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA
www.cambridge.org
Information on this title: www.cambridge.org/9780521130608

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First published 2012

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Alexander, Gregory S., 1948–

An Introduction to Property Theory / Gregory S. Alexander, Eduardo M. Peñalver.
pages cm. – (Cambridge introductions to philosophy and law)

Includes bibliographical references and index.

ISBN 978-0-521-11365-6 (hardback) – ISBN 978-0-521-13060-8 (paperback)

1. Property. 2. Property–Philosophy. 3. Right of property.

I. Peñalver, Eduardo Moisés, 1973– II. Title.

K720.A44 2012

346.04–dc23 2011049203

ISBN 978-0-521-11365-6 Hardback
ISBN 978-0-521-13060-8 Paperback

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G.S.A. – To the memory of Robert D. Evans, Esq., mentor, confidant, friend.

E.M.P. – To Mami.

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Preface

Property theory has undergone something of a renaissance of interest within the legal academy over the past several years. The field has become the site of major disputes concerning both the conceptual nature of ownership and its normative underpinnings. In part, this revival of interest reflects broader social, political, and economic developments. These include controversies surrounding the government's use of its eminent domain power, debates over the state's power to regulate and tax owners, and the dramatic increase in the economic importance of intellectual property assets. Within these arguments, people have (at times implicitly) relied upon divergent understandings of the normative foundations and meanings of ownership.

Property theory can be a daunting topic. For students encountering the subject for the first time, the classic texts in the field are often incomprehensible and the arguments inaccessibly abstract. A common reaction when students are introduced to these sources during the first-year property course is, why bother? There is very good reason to bother. Theory matters. At the base of every single property debate are competing theories of property – different understandings of what private property is, why we have it, and what its proper limitations are. In these disputes, theory as such may not be explicitly articulated, but it is always near the foundation of the disagreement.

Our aim in this book is to survey the leading theories of private property in Western (primarily Anglo American) legal thought. Our goal in this respect is neither to cover every conceivable theory nor to discuss every facet of the theories we do include. Instead, we hope to make the major property theories comprehensible, without sacrificing accuracy or sophistication.

The book's second goal is normative. Among the theories we survey is the human flourishing theory, commonly associated with Aristotle. We believe that this theory, whose counterpart in moral philosophy is enjoying a revival of interest, offers an attractive alternative to the currently dominant legal property theory, utilitarianism,

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and its cognate, law-and-economics. Our treatment of that theory in both Parts I and II reflects this commitment. However, we have tried to avoid placing too heavy a thumb on the scale, in the hope that readers who are not attracted to the human flourishing theory but who wish to know something about it will find our treatment of it appealing.

This book is a collaboration in more than one way. Not only is it a collaboration between the two of us, but also with a number of individuals who have helped us in various ways. First, our colleagues at Cornell Law School, where we first aired several of these chapters, helped us in more than one way. To them we are immensely grateful for their support and constructive criticism. We count ourselves extremely fortunate to be members of a faculty that is at once intellectually demanding of its members and genuinely collegial. We are particularly grateful to Oskar Liivak for helpful comments on Chapter 9. Second, colleagues at other institutions where we presented various chapters have improved our efforts, whatever the merits of the final product. These institutions include the Fordham Law School, where we discussed themes developed in the book at a conference on “The Social Function of Property” (thanks to Professors Sheila Foster and Daniel Bonilla, the co-organizers). We also presented chapters of the manuscript at the University of Cape Town (particular thanks to Professor Hanri Mostert for inviting us), the UCLA Law School, the University of Michigan Law School, the University of Chicago Law School, and finally, at the University of Stellenbosch in South Africa, where we spent two weeks teaching a group of graduate law students in Professor Andre van der Walt’s seminar on property theory. We are deeply grateful to Professor van der Walt for his kind invitation and invaluable comments and to his wonderful students and colleagues, particularly Sue-Mari Maass. We also owe a debt of gratitude to Stewart Schwab, the Allan R. Tessler Dean of Cornell Law School. His support has come in multiple forms, including generous financial support and intellectual encouragement. Finally, we happily acknowledge as collaborators our respective administrative assistants, Lyndsey Clark and Allen Czelusniak, and the superb staff at Cornell Law Library. We thank them all.